

**Fair Political Practices Commission**  
**Memorandum**

**To:** Chairman Johnson, Commissioners Hodson, Huguenin, Leidigh, & Remy

**From:** William J. Lenkeit, Senior Commission Counsel  
Scott Hallabrin, General Counsel

**Subject:** Agency Tickets – Repeal and Readoption of Regulation 18944.1 and  
Adoption of Regulation 18944.3

**Date:** August 29, 2008

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**Proposed Commission Action and Staff Recommendation:** Approve for publication of notice the repeal and readoption of Regulation 18944.1, concerning tickets given to and by state and local agencies that result in a possible gift to a public official in the agency, and adoption of Regulation 18944.3, relating to other items given by an agency to one of its officials.

**Status of Proposed Regulations:** Continuing with the Commission's examination of "gifts to agencies," which began with the recent changes to Regulation 18944.2, this project now examines the issue of tickets, free passes, and other items given to and by agencies to officials in those agencies. The Commission discussed this issue at the June 12, 2008, meeting and directed staff to hold an interested persons' meeting, which took place on July 10, 2008. Approximately 15 members of the public attended in person and another 12 participated by telephone, including approximately 7 or 8 city attorneys.

**Reason for Proposed Action:** Regulation 18944.1 professes to deal with "gifts to agencies," but what the regulation really provides is a method by which personal benefits can be passed along to individuals through the agency, without reporting by the official, when those benefits would be gifts under the Act if given directly to the official. Under the existing version of Regulation 18944.1, an agency may receive free tickets for use by agency *officials and their families* at any event so long as the tickets are not earmarked by the donor for any individual and the agency has a written policy for distributing the tickets, *whether or not the tickets are used for a public or governmental purpose*.

The current regulation allows agencies to accept tickets from any person<sup>1</sup> and distribute those tickets to their employees and their families for their own personal use provided the agency keeps a record of who they gave them to. So long as the agency follows this policy the regulation provides that there is no gift at all to the agency

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<sup>1</sup> Section 82047 defines "person" as "an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert."

employees. Therefore, the gift limit and disclosure provisions of the Act do not apply. However, there is absolutely no support anywhere in the Act, or elsewhere, for this exception.

In addition to providing a distribution method for tickets received from an outside source, the regulation also provides that if the agency has some connection with the facility, such as a publicly-owned facility under the jurisdiction of the agency or operated under a joint powers agency, or if the tickets are provided as part of a contract for the use of the facility, the tickets *may be earmarked for specific officials*. Many local agencies with these arrangements provide a fixed number of tickets to their elected officials allowing them to attend events at those facilities without any cost to them. Again, pursuant to this regulation, they are not considered “gifts” and, therefore, are not reportable.

What is clear is that the Commission has, by regulation, provided a safe harbor through which agencies can distribute tickets whether provided by any outside source, or from agency assets, or purchased with public monies, to its own officials for their personal enjoyment with practically no accountability under the Act. Accordingly, staff believes that current Regulation 18944.1 is so flawed it should be repealed and replaced with more limited restrictions that comport with the Act’s gift reporting and limits.

**Current Regulation 18944.1:** Unlike the basic gift-to-agency rule set forth in Regulation 18944.2, this regulation does not even require that a specific governmental or public purpose be served in order for the exception to apply. Furthermore, the current regulation provides exceptions that do not appear to be consistent with the Act’s definition of “gift” and, with respect to certain types of tickets, authorizes exceptions that completely swallow the rules the Act places on receiving gifts.

The Act defines a gift as: “any payment that confers a *personal benefit* on the recipient to the extent that consideration of equal or greater value is not received....” (Section 82028(a), emphasis added.) With a few exceptions,<sup>2</sup> there are no provisions exempting any person from being the *source* of a gift, so, an agency could, under the Act, be considered the source of a gift.<sup>3</sup> On the other hand, the “personal benefit” requirement would seem to limit, by definition, the class of *recipients* of a gift to individuals only, as the word “personal” means “of or relating to a particular person; private.”<sup>4</sup> Accordingly, because anything received by an agency would not confer a personal benefit on the recipient agency it, by definition, cannot be a “gift” to the agency under the Act. This view is consistent with other provisions of the Act, as only individuals, not agencies, are required to disclose their economic interests, and only individuals, not agencies, are prohibited from participating in actions that may affect those economic interests.

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<sup>2</sup> Section 82013(b)(3) states that “gifts” from certain identified relatives are not gifts under the Act, nor is a devise or inheritance.

<sup>3</sup> However, the California Constitution (Article XVI § 6) prohibits any public agency from making “any gift or authoriz[ing] the making of any gift of any public money or thing of value to any individual, municipal or other corporation whatever. ...”

<sup>4</sup> The American Heritage dictionary (3<sup>rd</sup> Ed.).

The current regulation contains five subdivisions, each offering an exception that states that tickets are not gifts under the scenario it provides. Subdivision (a) addresses tickets given by the source to the agency rather than directly to any individual official. As stated above, at this stage, no gift has yet occurred under the Act's definition of gift, no matter what the purpose may be. It, nevertheless, then requires that the "sole purpose" be for "distributing the passes or tickets to officials of the agency *and their spouses and immediate families*," and requires the use of the tickets be limited by the agency for that purpose. Subdivision (a) provides two more requirements for the exception to apply. One merely restates the law as it already exists – that the tickets can't be earmarked by the donor. The last provides that the agency must have a written record of the terms under which they received and distributed the tickets and to whom they were distributed.

Subdivision (b) provides an even broader exception. If the event is held at a publicly owned facility under the jurisdiction of the agency, the only requirements are that the tickets are all provided to the agency and the distribution of the tickets be limited to agency employees and their families. There is no requirement that any record be kept. Under this exception, a professional sports team, for example, could blanket local agency officials with tickets and there would be no record of it.

Subdivisions (c) and (e) are even broader still. They essentially allow agencies that receive tickets either under a contract for use of the facility, or because they are a party to a joint-powers agreement operating the facility, to distribute those tickets as they see fit. All that is required is for the agency to adopt a policy that regulates the distribution of the tickets. But the regulation places no requirements or parameters on how that distribution is to be regulated, not even requiring a showing of public purpose.

Finally, subdivision (d) provides an exception for an official who receives a ticket for admission to a facility because he or she has an official or ceremonial role to perform on behalf of the agency. This exception has been reincorporated into the proposed new version of Regulation 18944.1.

**Proposed New Regulation 18944.1:** Proposed new Regulation 18944.1 addresses three means by which an official may acquire a ticket or pass: (1) the ticket is provided to the official directly by a source other than the agency; (2) the ticket is provided to the agency from an outside source and used by an agency official; and (3) the ticket is acquired by the agency either through a contract for use of the agency facility or for an agency controlled event.

As stated above, with a few identified exceptions, the Act defines "gift" as any payment that provides a personal benefit, irrespective of who provides the payment, unless the person who receives the payment can show that consideration of equal or greater value was provided, in which case it is considered income. (See Section 82028.)

Current Regulation 18944.1 permits public agencies to act as a vehicle to receive tickets, the very nature of which is to provide a personal benefit to its holders, and then

transfer that personal benefit to its employees without triggering the gift provisions of the Act. However, for an official to avoid receipt of a gift, the Act requires a showing that consideration of equal or greater value be provided in exchange for that personal benefit. The current regulation ignores this requirement and assumes that because the official is employed by the agency, this showing need not be made. There is no support within the Act whatsoever for that proposition.

The exceptions provided in this regulation must be limited to the confines established by the Act. They may not go beyond these boundaries. If the Act places a burden of showing that equal or greater value was provided for a benefit received, the regulation must address and provide for this requirement.

The proposed regulation differs from the current regulation in that, by its provisions, it recognizes that the personal benefit received by using the ticket must be balanced by a showing that equal or greater value was provided (income), irrespective of the fact that the agency provides the ticket. Simply put, that means that the equal or greater value received must be in the form of a governmental or public benefit. If agency/public resources are used to provide a uniquely personal benefit to public employees the agency/public must receive equal or greater value in return. The proposed regulation confronts that issue.

The first scenario, subdivision (b), provides the only exception to the gift rules that would apply when a ticket is provided directly to an official from a source outside the official's agency. This exception is the one exception that is retained from the current regulation. The exception applies when an official attends an event for the purpose of performing an official or ceremonial role or function on behalf of the agency, such as cutting the ribbon inaugurating construction of a new building or throwing out the first pitch on opening day at a baseball game.

While the first exception applies when the source of the gift is a person outside the agency, the next two exceptions apply when the agency is the one determining to whom the ticket will be distributed. The former of those two exceptions, listed under subdivision (c), applies when the ticket is given to the agency from an outside source that is under no obligation to provide the ticket, and the agency then passes the ticket to one of its officials for his or her use. To qualify for this exception, the ticket may not be earmarked, the agency must determine by whom it will be used, and the use of the ticket must be in furtherance of a specific governmental or public purpose.

The final exception, listed under subdivision (d) applies when the agency "owns" the ticket as a result of a negotiated contractual agreement where it is provided a certain number of tickets because it either owns or controls the use of the venue or operates the event. A high percentage of the tickets covered by this regulation fall into this category, including tickets for athletic and other performances at municipal stadiums or arenas and tickets for events held at numerous civic arenas and auditoriums, concert venues, race tracks, etc. Also included within this group are tickets to the State Fair and the numerous

county fairs throughout the state. Here again, to qualify for this exception the use of the ticket must be in furtherance of a specific governmental or public purpose.

Two additional subdivisions help clarify the proposed regulation and set forth provisions to further its purpose. Subdivision (e) requires an agency that distributes tickets to do so in accordance with a written policy that states the specific governmental or public purpose to be accomplished by the agency in distributing tickets. It also states that any predetermined distribution to officials by their position does not meet the governmental or public purpose requirement unless the job duties of the position require attendance at the event. Subdivision (f) requires posting on the agency website, within 30 days of the event, the name of the person receiving the ticket along with the date, description, and cost of the event, and the governmental or public purpose for which the ticket was used.

Subdivision (g) provides that if food, beverages, or other items not included with the admission to the event are provided to the official, these are not included within the gift exception provided under the regulation.

The final subdivision clarifies that nothing in the regulation prevents an agency from adopting any policy that provides tickets to officials as part of their compensation, and the ticket is not a gift, so long as the payment is treated as income for tax purposes and the agency distributes and reports the ticket as required in subdivisions (e) and (f).

**Summary:** The Act states that an official receives a gift if he or she receives a personal benefit of value and provides no consideration in return. Current Regulation 18944.1 deviates from this requirement by permitting an official to use a ticket for purely personal use and benefit without providing any consideration. Proposed Regulation 18944.1 rectifies this problem by providing two alternative methods by which an official may accept the types of tickets addressed herein: (1) the agency may treat the ticket as part of the official's governmental salary, provided it is treated as such under applicable tax laws; or (2) the official may accept the ticket if there is a public benefit achieved through that official's use of the ticket. Proposed Regulation 18944.1 also ensures greater transparency by requiring posting of the distribution and use of the ticket on the agency's website so the public may more closely scrutinize how the agency's resources are being used and the agency can demonstrate that its officials are not receiving gifts that are subject to the Act.

**Regulation 18944.3:** Finally, Regulation 18944.3 was drafted to cover any situation where gifts are made to a public official using public funds. The regulation simply clarifies that in all situations where a gift of public funds is a misuse of public resources under state law, the Commission will treat the gift, when applicable, as a violation of the gift provisions of the Act.

Attachments: 1 – Repeal Regulation 18944.1 and Adopt Proposed Regulation 18944.1 and Regulation 18944.3